Supreme Court, U.S.
FILED

091408 MAY 19 2010

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON I. MILLER, PRIVATE,
UNITED STATES ARMY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

MARK TELLITOCCI
Colonel, United States Army
Chief, Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate Attorney,
Defense Appellate Division

SHAY STANFORD
Captain, United States Army
Branch Chief,
Defense Appellate Division

BRENT A. GOODWIN
Captain,
United States Army
Council of Record
U.S. Army Legal
Services Agency,
Defense Appellate
Division,
901 N. Stuart St.,
Suite 340,
Arlington, VA 22203
(703) 588-6020
brent.a.goodwin@
us.army.mil

Counsel for Petitioner

QUESTION PRESENTED

Whether the Army Court of Criminal Appeals abrogated petitioner's right to a jury under the Uniform Code of Military Justice, 10 U.S.C. §§ 825 and 852, by reassessing petitioner's sentence after significant charges were set side on appeal, rather than remanding the case for a sentence rehearing by a jury of enlisted members, as petitioner originally selected?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED . . . 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 7

Procedural History 7

Statement of Facts 9

REASONS FOR GRANTING THE WRIT 10

SUMMARY OF ARGUMENT 10

ARGUMENT 10

CONCLUSION 16

APPENDIX A - United States Court of Appeals for the Armed Forces Order 1a

APPENDIX B - United States Army Court of Criminal Appeals Decision on Further Review . . 3a

APPENDIX C - United States Army Court of Criminal Appeals Memorandum Opinion 8a

APPENDIX D - United States Court of Appeals for the Armed Forces Opinion 22a

TABLE OF AUTHORITIES

Cases *Page(s)*

Apprendi v. New Jersey, 530 U.S. 466 (2000). 13

Ex parte Quirin, 317 U.S. 1 (1942). 13

Jackson v. Taylor, 353 U.S. 569 (1957) 14

United States v. Bauerbach, 55 M.J. 501 (C.A.A.F. 2001) 12

United States v. Dowty, 60 M.J. 163 (C.A.A.F. 2004) 12

United States v. Kemp, 46 C.M.R. 152 (C.M.A. 1973) 13

United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009) 2, 8

CONSTITUTION, STATUTES, AND RULES FOR COURTS-MARTIAL:

U.S. CONST. amend. V 2, 10, 12

U.S. CONST. amend. VI 2, 3, 10, 11, 12

10 U.S.C. § 816. . . . . 3, 9, 10, 12

10 U.S.C. § 825 . . . . . 3, 10, 12

10 U.S.C. § 825a 4

10 U.S.C. § 825(c)(1) 5

10 U.S.C. § 839(a) 5

10 U.S.C. § 851 . . . . . 3, 10, 12

10 U.S.C. § 851a 6

10 U.S.C. § 852 . . . . . 3, 10, 11, 12

10 U.S.C. § 852(b)(3) 6

10 U.S.C. § 866 . . . . . 3, 10, 11

10 U.S.C. § 866(c) 6

10 U.S.C. § 867(a)(3) 2

10 U.S.C. § 886 7

10 U.S.C. § 891 7

10 U.S.C. § 895 7

10 U.S.C. § 917 . . . . . 7, 8

10 U.S.C. § 934 7

28 U.S.C. § 1259(3) 2

Rules for Courts-Martial 1003(c)(1)(C). 13

MISCELLANEOUS

Uniform Code of Military Justice: Hearing on H.R. 2498 Before the H.R. Subcommittee of the Committee on Armed Services, 81st Cong. (1949). 11

SEN. REP. NO. 486, at 2 (1949). 11

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON I. MILLER, PRIVATE,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Brandon I. Miller, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Armed Forces is unreported (Appendix A). The *per curium* decision of the United States Army Court of Criminal Appeals is unpublished (Appendix B). The original decision by the United States Army

Court of Criminal Appeals (Appendix C) was set aside by the United States Court of Appeals for the Armed Forces in *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009) (Appendix D).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on February 25, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Article 67(a)(3), Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

> case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

STATUTE INVOLVED

This case also involves Articles 16, 25, 51, 52 and 66, UCMJ; 10 U.S.C. §§ 816, 825, 851, 852, and 866. These sections are provided below:

10 U.S.C. § 816

> The three kinds of courts-martial in each of the armed forces are-

(1) general courts-martial, consisting of-

(A) a military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a); or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of-

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

10 U.S.C. § 825(c)(1):

Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled

> and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

10 U.S.C. § 851(a):

> Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

10 U.S.C. § 852(b)(3):

> All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

10 U.S.C. § 866(c):

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as

> approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

STATEMENT OF THE CASE

Procedural History

Before an enlisted panel[1] sitting as a special court-martial petitioner was convicted, contrary to his pleas, of absence without leave, assaulting a noncommissioned officer, resisting apprehension, communicating a threat, and using provoking speech, in violation of Articles 86, 91, 95, 117, and 134, UCMJ; 10 U.S.C. §§ 886, 891, 895, 917 and 934.

The panel sentenced petitioner to three months hard labor without confinement and a bad-conduct discharge. The convening authority reduced petitioner's sentence to a bad conduct discharge.

---

[1] A panel is the functional equivalent to a jury in the military justice system.

The Army Court of Criminal Appeals (Army Court) set aside the specification of provoking speech, Article 117, UCMJ, but denied any sentence relief, and affirmed the remainder of the enlisted panel's decision on March 24, 2008. (Appendix C).

The Court of Appeals for the Armed Forces (CAAF) reversed the decision of the Army Court, set aside the resisting apprehension charge, and remanded the case for sentence reassessment or a rehearing. *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009) (Appendix D).

On remand, the Army Court granted no sentence relief, and affirmed the remaining findings and sentence on August 11, 2009.

Petitioner appealed to CAAF on the issue:

> **WHETHER APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS WERE VIOLATED BY THE LOWER COURT'S FAILURE TO REMAND THE CASE FOR A SENTENCE REHEARING WHEN APPELLANT SELECTED SENTENCING BY MEMBERS RATHER THAN BY THE JUDICIARY AFTER APPELLANT HAS BEEN GRANTED SUBSTANTIAL RELIEF THROUGH HIS APPEAL.**

On February 25, 2010, CAAF granted petitioner's petition, but affirmed the Army Court's decision.

Statement of Facts

Petitioner was advised on the record by the military judge of his statutory right to choose to be tried by a panel of all commissioned officers, a panel of commissioned officers and at least one-third enlisted members, or military judge alone. 10 U.S.C. § 816.[2] Petitioner specifically invoked his right to be tried and sentenced by a panel of one-third enlisted Soldiers, rather than a military judge. At the trial level, these rights were not infringed upon. However, on appeal, two of five charges for which petitioner was convicted were set aside and three judges of the Army Court reassessed petitioner's sentence leaving the sentence unchanged. The three judge's were senior commissioned officers of the Judge Advocate General's Corps serving as judges on the Army Court.

---

[2] This provision outlines the default rule favoring trial by members, enlisted or officers. Trials by military judge alone are only permitted when the accused meets specific criteria, to include knowing the identity of the military judge, consulting with counsel, and making the request orally or in writing of the decision to request judge alone.

REASONS FOR GRANTING THE WRIT

The Army Court and the CAAF deprived petitioner of his constitutional and statutory right to be tried and sentenced by a panel composed of at least one-third enlisted service members rather than three judges.

SUMMARY OF ARGUMENT

Congress applied the Sixth Amendment right to a trial by jury to the system of military justice through statute. The Army Court's and CAAF"s abridgement of that right violates the due process clause of the Fifth Amendment. Allowing service courts to reassess sentences after charges have been set aside on appeal, when a Soldier elected an enlisted panel, converts the prophylactic duty to review sentences for appropriateness under Article 66, UCMJ, into original sentencing authority which is contrary to Congressional intent and violates the Constitution.

ARGUMENT

Congress implemented the constitutional right of trial by jury in the military justice system by establishing the statutory right of an enlisted service member to have the findings and sentence determined by an enlisted panel. 10 U.S.C. §§ 816, 825, 851, and 852. Additionally, Congress statutorily mandated that an enlisted service member be sentenced as agreed upon by two-thirds of the

members of a panel. 10 U.S.C. § 852. Although the military justice system requires that a sentence be reviewed for appropriateness by the Court of Criminal Appeals (10 U.S.C. § 866), that power to review a sentence does not vest Courts of Criminal Appeals with original sentence authority.

To allow Courts of Criminal Appeals composed entirely of senior commissioned officers, to re-sentence a service member after significant charges have been set aside, usurps enlisted Soldiers' statutory right to be sentenced by a panel of at least one-third enlisted members. Congress, by mandating that an enlisted service member may have his or her sentence decided by an enlisted panel, accommodated the Sixth Amendment's requirements and protections to the military justice system, by balancing the Constitutional right to trial by jury against the peculiar needs of the military. S. REP. NO. 486, at 2 (1949). Congress plainly stated, "a provision giving an accused enlisted man the privilege of having enlisted men as members of the court trying his case," as "among the provisions designed to insure a fair trial," when it established the UCMJ. *Id.* The Congressional Hearings on the enactment of the UCMJ are replete with discussions about the importance of a right to an enlisted panel. *Uniform Code of Military* Justice: *Hearing on H.R. 2498 Before the H.R. Subcommittee of the Committee on Armed Services*, 81st Cong., 2 (1949) (Through his questions, Representative Philbin made clear that to have enlisted men serve on panels would be a "jury trial of his own peers," and Representative Rivers

added that it would give the enlisted man a feeling of confidence in the system of military justice. *Id.* at 724; In his questions, Robert W. Brooks, Professional Staff Member, emphasized that having enlisted men on panels would "remove the criticism that has been leveled at these trials which prohibited the use of enlisted men . . . to that extent it will have a good moral effect." *Id.* at 1140-41).

"The Uniform Code of Military Justice, enacted in 1950, was Congress' evolutionary response to public demands for increased procedural due process in military justice that began with the "Texas Mutiny" and "Houston Riot" cases of 1917." *United States v. Bauerbach*, 55 M.J. 501, 503 (C.A.A.F. 2001). The plain language of the statute, the Congressional record and public sentiment prior to enactment of the UCMJ, all show that Congress intended to give enlisted men and women the right to an enlisted panel as a means to better protect their constitutional rights.

Abridging the statutory right of a Soldier to have an enlisted panel decide his sentence violates the UCMJ, Fifth Amendment due process protections, and implicates Sixth Amendment concerns. 10 U.S.C. §§ 816, 825, 851, and 852; *see* U.S. CONST. amend. V and VI. Although the CAAF has held the right to a jury trial, as contemplated by the Sixth Amendment, does not apply in the military as to jury selection and juries being a representative cross section of the community (*United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *United Sates v.*

Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973) and *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942) (citations omitted)), this line of cases does not stand for the proposition that service members have no constitutional rights to some measure of a jury trial. Indeed, practical experience has demonstrated that military necessity does not require relinquishment of this Constitutional right; enlisted panels are convened routinely across the services and around the globe, including during armed conflict.

Just as the New Jersey sentencing procedure was "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system," in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), so too was the Army Court's action in this case. In *Apprendi*, this Court emphasized as a matter of constitutional law that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. Unlike the federal system where sentences run concurrently, in the military sentences run consecutively. Rule for Courts-Martial 1003(c)(1)(C). Every charge at a court-martial has potential to increase the maximum penalty that an accused faces. Thus, when charges are set aside on appeal and a service court simply reassesses the sentence based on the remaining charges, the right to trial by jury is offended when an accused elected a trial by enlisted panel, both as a matter of statute as well as the Constitution. Although, petitioner was subject to a special court-martial with jurisdictional limitations

on maximum sentence, the number and type of charges presented to the panel had an effect on the panel's sentencing decision.

As Justice Brennan pointed out in his dissent in *Jackson v. Taylor*, 353 U.S. 569, 581 (1957), "Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here, under the statute, only the court-martial was authorized to take this step." (The majority found no authority in that version of the UCMJ to remand a case for sentence rehearing and that Congress intended boards of review to modify sentences). Importantly, the majority in *Jackson* pointed out that the "petitioner claims no deprivation of constitutional rights," but rather argues only under military law. *Id.* at 572. In the case at bar, the petitioner specifically asserts deprivation of his constitutional rights as well as his statutory rights.

In the instant case, petitioner invoked his right to trial and sentencing by one-third enlisted members. During the course of the petitioner's appeal both the Army Court and CAAF overturned convictions of the petitioner for serious offenses. Therefore, the Army Court and CAAF violated petitioner's statutory and constitutional rights when petitioner was denied a panel rehearing on sentence.

Petitioner was originally sentenced to only hard labor and a bad conduct discharge.[3] Congress mandated that petitioner be sentenced by an enlisted panel. Put another way, petitioner contends that an enlisted panel, presented solely with the charges for which he stands convicted, with matters in aggravation limited to those relevant to those particular offenses, would likely not adjudge a punitive discharge. An enlisted panel must sentence appellant, as both petitioner and Congress intended.

---

[3] The Convening Authority approved only the bad conduct discharge.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

MARK TELLITOCCI
Colonel, United States Army
Chief,
Defense Appellate Division

JONATHAN POTTER
Lieutenant Colonel,
United States Army
Senior Appellate Counsel,
Defense Appellate Division

SHAY STANFORD
Captain, United States Army
Branch Chief,
Defense Appellate Division

BRENT A. GOODWIN
Captain,
United States Army
Council of Record
U.S. Army Legal
Services Agency,
Defense Appellate
Division,
901 N. Stuart St.,
Suite 340,
Arlington, VA 22203
(703) 588-6020
brent.a.goodwin@
us.army.mil

Counsel for Petitioner

APPENDIX A

UNITED STATES COURTS OF APPEALS FOR THE ARMED FORCES

No. 08-0580

UNITED STATES, Appellee

v.

Brandon I. Miller, U.S. ARMY, Appellant

Appeal from the Army Court of Criminal Appeals

February 25, 2010

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is, by the Court, this 25th day of February, 2010.

ORDERED:

That said petition is hereby granted; and,

That the decision of the United States Army Court of Criminal Appeals is affirmed.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

APPENDIX B

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

ARMY 20060224

UNITED STATES, Appellee

v.

Brandon I. Miller, Private E1
U.S. ARMY, Appellant

On Remand from the Court of Appeals
for the Armed Forces

---

11 August 2009

DECISION OF FURTHER REVIEW

Per Curiam:

A panel composed of officer and enlisted members sitting as a special courts-martial convicted appellant, contrary to his pleas, of absence without leave, assaulting a noncommissioned officer, resisting apprehension, using provoking speeches or gestures, and communicating a threat, in violation of Articles 86, 91, 95, 117, and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 886, 891, 895, 917, and 934. The panel sentenced appellant to a bad-conduct discharge and hard labor without confinement for three months. The convening authority approved only the bad-conduct discharge.

During our initial review, we found the evidence legally and factually insufficient to support a finding of guilty to the charge of provoking speeches or gestures and set aside and dismissed that offense. We also found the evidence legally insufficient to support a finding of guilty to the charge of resisting apprehension, however, we affirmed a lesser included offense under the general article of a simple disorder, and affirmed the remaining findings of guilty. After conducting a sentence reassessment,

we affirmed the sentence approved by the convening authority.[1]

On 10 June 2009, the United States Court of Appeals for the Armed Forces reversed our prior decision. *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009). Specifically, our superior court set aside and dismissed the finding of guilty of a simple disorder under the general article, that is, Charge III and its Specification. Our superior court set aside the sentence and remanded the case for sentence reassessment or to order a rehearing on sentence. We are confident we can reliably reassess the sentence and a sentence rehearing is not necessary.

In *United States* v. *Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), our superior court reaffirmed the standard for sentence reassessment. "Thus, if the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error. . . ."

---

[1] *See United States v. Miller*, No. ARMY 20060224, slip op. at 4 (A. Ct. Crim. App. Mar. 24, 2008).

Id. at 41 (quoting *Sales*, 22 M.J. at 308). In curing the errors through reassessment, we must assure the sentence is "equal to or no greater than a sentence that would have been imposed if there had been no error." *Id.* (citing *Sales*, 22 M.J. at 308). *See also United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Under the circumstances of this case, to include our prior setting aside of Specification 2 of Charge IV, and our superior court's setting aside of Charge III and its specification, we remain confident that a rehearing is not necessary.

The set aside findings do not dramatically change the sentencing landscape in this case. The adjudged sentence remains well below the authorized maximum, and the convening authority's action reduced the adjudged sentence even further. The offensive nature of appellant's assault and threat, when coupled with the presentencing evidence, leaves us secure in our position that the panel would have imposed a sentence of a certain magnitude had appellant been convicted of only the remaining charges and specifications. Therefore, we can reliably determine the sentence the panel would have imposed had appellant's trial been error-free.

Considering the nature of the remaining findings of guilty, the entire record, the sentence adjudged at trial, and applying the principles of *Moffeit*, 63 M.J. at 40, 42-44 and *Sales*, 22 M.J. at 305, 307-08 to include those principles identified by Judge Baker in his concurring opinion in *Moffeit*, we are confident with our determination in this case. "[W]e perceive no reasonable possibility of benefit to [appellant] by remand of the record . . . for reassessment of the sentence." *United States* v. *Sims*, 57 M.J. 419, 422 (C.A.A.F. 2002) (citation omitted). We affirm the remaining findings of guilty and affirm the sentence as approved by the convening authority.

For the Court,
s/ Malcolm H. Squires Jr.
MALCOLM H. SQUIRES, JR.
Clerk of the Court

APPENDIX C

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

ARMY 20060224

UNITED STATES, Appellee

v.

Private E1 BRANDON I. MILLER
United States Army, Appellant

Appeal from Headquarters, 2nd Infantry Division

---

24 March 2008

Before
SCHENCK, COOK, and WALBURN
Appellate Military Judges

MEMORANDUM OPINION

SCHENCK, Senior Judge:

A panel composed of officer and enlisted members sitting as a special court-martial convicted appellant, contrary to his pleas, of absence without leave, assaulting a noncommissioned officer, resisting apprehension, using provoking speeches or gestures, and communicating a threat, in violation of Articles 86, 91, 95, 117, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, 895, 917, and 934 [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge and hard labor without confinement for three months. The convening authority approved only the bad-conduct discharge.[1] This case is before the court for

---

[1] At trial, the military judge granted appellant 41 days of confinement credit. In his post-trial recommendation, the staff judge advocate recommended that the convening authority grant an additional 15 days of confinement credit for post-trial delay. Although the approved sentence did not include confinement, the convening authority's action should have included this credit. *See* Rule for Courts-Martial 1107(f)(4)(F); Army Reg. 27-10, Legal Services: Military Justice, para. 5-28a (16 Nov. 2005) (requiring a convening authority to "show in [the] initial action all credits against a sentence to confinement . . . regardless of the source of the credit . . . or for any . . . reason specified by the judge"); *United States v. Delvalle*, 55 M.J. 648, 649 n.1, 656 (Army Ct. Crim. App. 2001); *United States v. Arab*, 55 M.J. 508, 510 n.2, 520 (Army Ct. Crim. App. 2001). Accordingly, to the extent appellant has not already received this credit,

review under the provisions of Article 66, UCMJ.

DISCUSSION

We agree with appellant's assertion that the evidence is factually insufficient to support a finding of guilty to resisting apprehension, the Specification of Charge III. Nevertheless, we find sufficient evidence to affirm a finding of guilty to the lesser-included offense under the general article of a simple disorder, conduct prejudicial to good order and discipline or conduct of a nature to bring discredit upon the armed forces. We also agree with appellant that the evidence is legally and factually insufficient to support a finding of guilty to Specification 2 of Additional Charge IV, provoking speeches or gestures. We will grant appropriate relief and reassess the sentence in our decretal paragraph.

Law

Under a legal sufficiency analysis we must determine whether, "considering the evidence in the light most favorable to the government, a rational fact-finder could have found all the essential elements of the offense beyond a reasonable doubt." *United States v. Craion*, 64

---

appellant will be credited with 56 days of confinement credit.

M.J. 531, 534 (Army Ct. Crim. App. 2006) (citing *United States v. Brooks*, 60 M.J. 495, 497 (C.A.A.F. 2005); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)).

Under a factual sufficiency analysis, "after weighing the evidence of record and making allowances for not having personally observed the witnesses, we [must be personally] convinced of appellant's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). This court must base its decision as to legal and factual sufficiency on the "entire record." *United States v. Bright*, 60 M.J. 936, 938 (Army Ct. Crim. App. 2005) (citing *United States v. Adams*, 59 M.J. 367, 372 (C.A.A.F. 2004) (quoting Article 66(c), UCMJ)). It is the duty of this court to determine the factual sufficiency of the evidence supporting appellant's conviction after weighing the evidence and making allowances for not having personally observed the witnesses. We must do so and be convinced of an accused's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *United States v. Scott*, 40 M.J. 914, 917 (A.C.M.R. 1994), *aff'd*, 42 M.J. 457 (C.A.A.F. 1995).

"The review of *findings*—of guilt or innocence—[is] limited to the evidence presented at trial." *United States v. Beatty*, 64 M.J. 456, 457 (C.A.A.F. 2007) (emphasis in

original, internal citations omitted). *See United States v. Holt*, 58 M.J. 227, 232 (C.A.A.F. 2003); *United States v. Gray*, 51 M.J. 1, 15 (C.A.A.F. 1999) (citing *United States v. Bethea*, 22 U.S.C.M.A. 223, 46 C.M.R. 223 (1973)). "A fact essential to a finding of guilty must appear in the evidence presented on the issue of guilt; it cannot be extracted from evidence presented in other proceedings in the case." *United States v. Boland*, 1 M.J. 241, 242 (C.M.A. 1975). *See United States v. Estrella*, 21 M.J. 782, 783 (A.C.M.R. 1986) (citing *Boland*, 1 M.J. at 242) (court could not consider trial defense counsel's repeated specific statements, in voir dire examination and in closing argument, that victim was 6 years old).

Resisting Apprehension

The elements of the offense of resisting apprehension are: "(a) That a certain person attempted to apprehend the accused; (b) That said person was authorized to apprehend the accused; and (c) That the accused actively resisted the apprehension." *Manual for Courts-Martial, United States* (2005 ed.) [hereinafter *MCM*], Part IV, para. 19b(1) (the same provisions were in effect at the time of appellant's trial).

Apprehension is further defined as "the taking of a person into custody." *Id.* at para.

19c(10). Furthermore, "[t]he resistance must be active, such as assaulting the person attempting to apprehend. Mere words of opposition . . . and attempts to escape from custody after the apprehension is complete[d], do not constitute the offense of resisting apprehension although they may constitute other offenses." The *MCM* also indicates that:

> "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

Id. at para. 19c(4)(a).

The panel convicted appellant of resisting apprehension by Private First Class (PFC) ES, a military police officer (MP) at the Korean National Police (KNP) "box" outside the gate of Camp Red Cloud (CRC), Republic of Korea on 11 March 2005. Private First Class ES, his partner, and Mr. H, a Korean National Investigator, responded to a radio call to take

custody of appellant at the CRC gate. Upon their arrival, appellant was in hand irons in the custody of the KNPs. Once the hand irons were removed, PFC ES testified that appellant "sprinted to the door[.]" While the MPs continued their efforts to put the accused in hand irons, he kept "trying to fight us" and was "swinging his arms around . . . kept turning, making it hard for [the MPs] to grab his arms" at which time appellant hit Mr. H. The KNPs again put appellant in custody until he was taken to the KNP station later that night.

Based on these facts and the definitions described above, at the time of the offense, the KNPs had placed appellant in custody and were transferring custody of appellant to the MPs. Consequently, the evidence is factually insufficient and we cannot affirm appellant's conviction to resisting apprehension. *See United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978) (holding that because the guards already apprehended the accused and had him in custody, a conviction for resisting apprehension fails for factual insufficiency.)

This, however, does not end our analysis. Our superior court has

> long recognized that an appellate court may disapprove a finding because proof of an essential

> element is lacking or, as a result of instructional errors . . . may substitute a lesser-included offense for the disapproved findings. *This is true even if the lesser-included offense was neither considered nor instructed upon at the trial of the case.*

United States v. McKinley, 27 M.J. 78, 79 (C.M.A. 1988) (emphasis added). We will apply that principle in this case and affirm a finding of a simple disorder violation.[2]

The evidence presented at trial firmly established that appellant's conduct was prejudicial to good order and discipline or service discrediting and constituted a simple disorder under Article 134, UCMJ. *See United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F. 2000) (holding evidence in a contested trial failed to support maltreatment offense, but was sufficient support for reviewing court to affirm a violation of Article 134, UCMJ); *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000) (holding admissions during providence inquiry sufficient for reviewing court to affirm a violation of Article 134, UCMJ); *United States v. Sapp*, 53 M.J. 90

---

[2] We note the offense of escape from custody, while also an Article 95, UCMJ offense, is not a lesser-included offense of resisting apprehension. *See MCM*, Part IV, para. 19b(4).

(C.A.A.F. 2000) (affirming a violation of the general article, simple disorder, when insufficient evidence existed to support the greater offense of violation of 28 U.S.C. § 2252 (a)(4)(A)). "Conduct is punishable under Article 134 if it is prejudicial to good order and discipline in the armed forces or is of a nature to bring discredit upon the armed forces." *Fuller*, 54 M.J. at 112. Appellant's conduct was both, when in the presence of the KNPs appellant hit Mr. H and struggled with the MPs at the CRC gate. Furthermore, "appellant was clearly on notice of this lesser-included offense because every enumerated offense under the UCMJ is per se prejudicial to good order and discipline or service-discrediting." *Id.* (citing *United States v. Foster*, 40 M.J. 140,143 (C.M.A. 1994)). As such, we affirm the lesser-included offense of simple disorder.

Provoking Speeches or Gestures

Appellant also asserts the evidence is legally and factually insufficient to support a finding of guilty to Additional Charge IV, Specification 2, provoking speeches or gestures. We agree.

The elements for the offense of use of provoking speeches or gestures are:

"(1) That the accused wrongfully used words or gestures toward a certain person; (2) That the words or gestures used were provoking or reproachful; and (3) That the person toward whom the words or gestures were used was a person subject to the code." *MCM*, Part IV, para. 42b (the same provisions were in effect at the time of appellant's trial). The terms "provoking" and "reproachful" are defined in the *MCM* as "those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances." *Id.* at para. 42c(1). *See also United States v. Adams*, 49 M.J. 182, 185 (C.A.A.F. 1998); *United States v. Davis*, 37 M.J. 152, 154 (C.M.A. 1993). "Breach of the peace" is defined in the *MCM* as "an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature." *Id.* at para. 41c(2).

The panel found appellant not guilty of the offense of communicating a threat, but guilty of the lesser-included offense of using provoking speeches or gestures on 28 January 2006 for stating, "I'll kill your roommate, [Corporal (CPL)] Y for snitching on you," or words to that effect. At trial, Private (PV2) JM testified that he received a call on his cell phone from appellant while PV2 JM was in a café in Seoul. Appellant sounded like he had been drinking. Private JM heard appellant

threaten to kill "an old roommate," CPL Y, who apparently was not present at the time of the call. The only explanation for this threat, however, was PV2 JM's testimony that appellant threatened CPL Y, "[b]ecause previously, I had gotten in some sort of trouble and I guess [appellant] was mad at my roommate or something . . . ." Private JM further testified that he believed appellant was serious. Nevertheless, PV2 JM also agreed that he did not feel appellant was an immediate threat to his former roommate. During this telephone conversation, appellant also asked PV2 JM to meet him in Seoul, but PV2 JM declined. No apparent animosity existed between PV2 JM and appellant. In fact, it appeared that appellant was threatening CPL Y in defense of PV2 JM. After considering all the testimony and evidence presented at trial, under the circumstances of this case, we are not convinced beyond a reasonable doubt that a reasonable person would have expected appellant's telephonic threat of future harm to a third person (which in all likelihood did not offend or place the listener in fear for himself) to induce a breach of the peace. Accordingly, we will dismiss the specification.

CONCLUSION

The court affirms only so much of the findings of guilty of the Specification of Charge

III and Charge III as finds that appellant did, at or near Uijeongbu, Republic of Korea, on or about 11 March 2005, hit Mr. H and struggle with and run from PFC ES, a MP and a person authorized to apprehend the accused when the MPs were assuming custody of appellant, which conduct was of a nature to bring discredit upon the armed services and was to the prejudice of good order and discipline in the armed services, in violation of Article 134, UCMJ.

The finding of guilty to Specification 2 of Charge IV is set aside and dismissed. The remaining findings of guilty are affirmed.

In light of our decision, we must now reassess appellant's sentence. Because we can "reliably determine what sentence would have been imposed at the trial level if the error had not occurred," we need not order a rehearing on the sentence. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). In *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), our superior court reaffirmed the standard for sentence reassessment. "Thus, if the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, [then] a sentence of that severity or less will be free of the prejudicial effects of error . . . ." *Id.* at 41 (quoting *Sales*, 22 M.J. at 308). In curing the errors through reassessment, we must assure

the sentence is "equal to or no greater than a sentence that would have been imposed if there had been no error." *Id.* (citing *Sales*, 22 M.J. at 308). *See United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). Under the circumstances of this case, we are confident that a rehearing is not necessary.

Despite our setting aside Specification 2 of Charge IV, the adjudged sentence was well below the authorized maximum and was decreased even further by the convening authority's action. Due to the offensive nature of appellant's conduct, we are secure in our position that the panel would have imposed a sentence of a certain magnitude had appellant been convicted of only the remaining charges and specifications. In short, the sentencing landscape in this case has not changed dramatically, and we can reliably determine the sentence the panel would have imposed had appellant's trial been error free.

Reassessing the sentence on the basis of the errors noted, the entire record, and applying the principles of *Moffeit*, 63 M.J. at 40, 42-44 and *Sales*, 22 M.J. at 305, to include those principles identified by Judge Baker in his concurring opinion, the court affirms the sentence.

Judge COOK and Judge WALBURN concur.

For the Court,

MALCOLM H. SQUIRES, JR.
Clerk of Court

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 08-0580

UNITED STATES, Appellee,

v.

Brandon I. MILLER, Private, U.S. Army, Appellant.

Appeal from the Army Court of Criminal Appeals

Argued Feb. 25, 2009.
Decided June 10, 2009.

Before: Effron, C.J., Ryan, Baker, Erdmann and Stucky, Judges

---

OPINION

Judge RYAN delivered the opinion of the Court:

This case presents the question whether the Courts of Criminal Appeals, after finding the evidence factually insufficient to support a finding of guilty to a charged violation of an enumerated article of the Uniform Code of Military Justice (UCMJ), may affirm a conviction to a "simple disorder," under Article 134, UCMJ, 10 U.S.C. § 934 (2000), as an offense necessarily included in the enumerated articles.[1] *See* Article 79, UCMJ, 10 U.S.C. § 879 (2000) ("An accused may be found guilty of an offense necessarily included in the offense charged."); Article 59(b), UCMJ, 10 U.S.C. § 859(b) (2000) ("Any reviewing authority . . . may approve or affirm . . . so much of the finding as includes a lesser included offense."). We hold that Article 134, UCMJ, is not an "offense necessarily included" under Article 79, UCMJ, of the enumerated articles and may not be affirmed under Article 59, UCMJ.

---

[1] On Appellant's petition, we granted review of the following issue:

> WHETHER AFTER FINDING THE EVIDENCE FACTUALLY INSUFFICIENT TO SUPPORT A FINDING OF GUILTY TO CHARGE III AND ITS SPECIFICATION (RESISTING APPREHENSION), THE COURT OF CRIMINAL APPEALS COULD AFFIRM A FINDING OF GUILTY TO A LESSER INCLUDED OFFENSE ON A THEORY NOT PRESENTED TO THE TRIER OF FACT.

I. Factual Background

The charge at issue in this appeal stems from conduct that occurred at Camp Red Cloud, South Korea, on March 11, 2005. Early that morning, MPs were called to take custody of Appellant from the Korean National Police (KNP), who had apprehended Appellant for an alleged assault. The MPs arrived at the KNP guard box at the gate of Camp Red Cloud and proceeded to take Appellant into military custody. As the MPs went to place hand irons on Appellant, he ran to the door of the room, but was unable to leave because it was locked. Appellant struggled with the MPs and members of the KNP-hitting one KNP investigator-and was eventually subdued.

At Appellant's subsequent court-martial, the panel convicted him, contrary to his pleas, *inter alia,* of resisting apprehension in violation of Article 95, UCMJ, 10 U.S.C. § 895 (2000).[2] On appeal, the United States Army Court of Criminal Appeals (CCA) found the evidence factually insufficient to prove the resisting apprehension charge, as Appellant was already in custody when the MPs came to the KNP guard box. *United States v. Miller*, No. ARMY 20060224, slip op. at 4 (A.Ct.Crim.App. Mar. 24, 2008). The CCA stated:

---

[2] Appellant does not challenge his convictions of unrelated charges of going absent without leave, assaulting a noncommissioned officer, and using provoking words in violation of Articles 86, 91, and 117, UCMJ, 10 U.S.C. §§ 886, 891, 917 (2000), respectively.

The panel convicted appellant of resisting apprehension by Private First Class (PFC) ES, a military police officer (MP) at the Korean National Police (KNP) "box" outside the gate of Camp Red Cloud (CRC), Republic of Korea on 11 March 2005. Private First Class ES, his partner, and Mr. H, a Korean National Investigator, responded to a radio call to take custody of appellant at the CRC gate. Upon their arrival, appellant was in hand irons in the custody of the KNPs. Once the hand irons were removed, PFC ES testified that appellant "sprinted to the door." While the MPs continued their efforts to put the accused in hand irons, he kept "trying to fight us" and was "swinging his arms around . . . kept turning, making it hard for [the MPs] to grab his arms" at which time appellant hit Mr. H. The KNPs again put appellant in custody until he was taken to the KNP station later that night.

Based on these facts and the definitions described above, at the time of the offense, the KNPs had placed appellant in custody and were transferring custody of appellant to the MPs. Consequently, the evidence is factually insufficient and we cannot affirm appellant's conviction to resisting

> apprehension. *See United States v. Chavez,* 6 M.J. 615 (A.C.M.R.1978) (holding that because the guards already apprehended the accused and had him in custody, a conviction for resisting apprehension fails for factual insufficiency).

Id. at 4 (first set of brackets and ellipsis in original).

The CCA, however, proceeded to find Appellant guilty of a simple disorder under Article 134, UCMJ, as a lesser included offense, asserting that this Court has:

> long recognized that an appellate court may disapprove a finding because proof of an essential element is lacking or, as a result of instructional errors . . . may substitute a lesser-included offense for the disapproved findings. *This is true even if the lesser-included offense was neither considered nor instructed upon at the trial of the case.*

United States v. McKinley, 27 M.J. 78, 79 (C.M.A.1988) (emphasis added).

The evidence presented at trial firmly established that appellant's conduct was prejudicial to good order and discipline or service discrediting and constituted a simple disorder under Article 134,

UCMJ. *See United States v. Fuller,* 54 M.J. 107, 112 (C.A.A.F.2000) (holding evidence in a contested trial failed to support maltreatment offense, but was sufficient support for reviewing court to affirm a violation of Article 134, UCMJ); *United States v. Augustine,* 53 M.J. 95 (C.A.A.F.2000) (holding admissions during providence inquiry sufficient for reviewing court to affirm a violation of Article 134, UCMJ); *United States v. Sapp,* 53 M.J. 90 (C.A.A.F.2000) (affirming a violation of the general article, simple disorder, when insufficient evidence existed to support the greater offense of violation of 28 U.S.C. § 2252(a)(4)(A)). "Conduct is punishable under Article 134 if it is prejudicial to good order and discipline in the armed forces or is of a nature to bring discredit upon the armed forces." *Fuller,* 54 M.J. at 112. Appellant's conduct was both, when in the presence of the KNPs appellant hit Mr. H and struggled with the MPs at the CRC gate. Furthermore, "appellant was clearly on notice of this lesser-included offense because every enumerated offense under the UCMJ is per se prejudicial to good order and discipline or service-discrediting." *Id.* (citing *United States v. Foster,* 40 M.J. 140, 143 (C.M.A.1994)). As such, we affirm the lesser-included offense of simple disorder. *Id.* at 4-5 (emphasis in original).

II. Discussion

The threshold question is whether a simple

disorder under Article 134, UCMJ,[3] was a lesser included offense of the violation of Article 95, UCMJ,[4] in this case. Whether an offense is a lesser included offense is a question of law we review *de novo*. *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F.2004); *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F.2002).

The Constitution requires that an accused be on notice as to the offense that must be defended against, and that only lesser included offenses that meet these notice requirements may be affirmed by an appellate court. *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Cole v. Arkansas*, 333 U.S. 196, 201, 68

---

[3] Elements of Article 134, clauses 1 and 2, are: (1) the accused did or failed to do certain acts; and (2) under the circumstances, the accused's conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* pt. IV, para. 60.b (2002 ed.) *(MCM)*.

[4] Elements of resisting apprehension under Article 95, UCMJ, are: (1) a certain person attempted to apprehend the accused; (2) the said person was authorized to apprehend the accused; and (3) the accused actively resisted the apprehension. *MCM* pt. IV, para. 19.b(1).

S.Ct. 514, 92 L.Ed. 644 (1948) ("No principle of procedural due process is more clearly established than . . . notice of the *specific charge,* and a chance to be heard in a trial of the issues raised by *that charge* . . . .") (emphasis added). "[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn v. United States,* 442 U.S. 100, 107, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); *see also Chiarella v. United States,* 445 U.S. 222, 236-37, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980) (stating that the Court would not affirm a conviction based on a theory not presented to the jury). "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn,* 442 U.S. at 106, 99 S.Ct. 2190.

Article 79, UCMJ, which provides that an accused "may be found guilty of an offense necessarily included in the offense charged," is consonant with these constitutional principles, and applies at both the trial and appellate levels. *See* Article 59, UCMJ (allowing an appellate court to affirm a conviction to a lesser included offense). In the explanation of Article 79, UCMJ, the President advises that "[a] lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged." *MCM* pt. IV, para. 3.b(1).[5]

---

[5] "Although *MCM* explanations of offenses are not binding on

The notice requirement is met when "the elements of the lesser offense are a subset of the elements of the charged offense." *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989); *see United States v. Weymouth*, 43 M.J. 329, 331-34 (C.A.A.F.1995) (analyzing lesser included offenses in the military under the *Schmuck* test). An accused is "by definition on notice" of a lesser included offense "because it is a subset of the greater offense alleged." *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F.2008).

Appellant argues that, in this case, simple disorder is not an offense necessarily included in resisting apprehension under the *Schmuck* test, because Article 134, UCMJ, has an element not present in Article 95, UCMJ. We agree that Article 134, UCMJ, clauses 1 and 2 include the element that, in addition to doing or failing to do a certain act, "under the circumstances, the accused's conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces"-an element not contained in the textual exposition of Article 95, UCMJ.

To be sure, language in *United States v. Foster*

---

this Court, they are generally treated as persuasive authority, to be evaluated in light of this Court's precedent." *United States v. Miller*, 67 M.J. 87, 89 (C.A.A.F. 2008) (citations omitted).

and its progeny suggests that a charged violation of an enumerated article, without more, provides sufficient notice of the element of prejudice to good order and discipline or service discrediting conduct. *See Foster*, 40 M.J. 140, 143 (C.M.A.1994) (stating that an accused is on notice of an Article 134, UCMJ, lesser included offense because every enumerated offense under the UCMJ is "*per se*" prejudicial to good order and discipline or service discrediting); *see also United States v. Fuller*, 54 M.J. 107, 112 (C.A.A.F.2000) ("[E]very enumerated offense under the UCMJ is *per se* prejudicial to good order and discipline or service-discrediting."); *United States v. Sapp*, 53 M.J. 90, 92 n. 2 (C.A.A.F.2000) ("[T]he elements of prejudice to good order and discipline and discredit to the armed forces are implicit in every enumerated offense."); *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F.1997) ("[A]n offense under Article 134 can be a lesser-included offense of an offense under an enumerated Article, notwithstanding the requirement under Article 134 to prove that the conduct was prejudicial or service-discrediting.").

But as our opinion last term in *Medina* made clear, the principle of fair notice mandates that "an accused has a right to know to what offense and under what legal theory" he will be convicted and that a lesser included offense meets this notice requirement if "it is a subset of the greater offense alleged." 66 M.J. at 26-27. This precedent is consistent with the Constitution and Supreme Court precedent regarding due process. *Id.* at 24 (citing

Schmuck, 489 U.S. at 716, 109 S.Ct. 1443); *see also United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F.2008) (noting that "[t]o satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the charged offense" (citing *In re Winship*, 397 U.S. at 364, 90 S.Ct. 1068)). In contrast, the above cited language from *Foster* and its progeny is at odds with these principles. To the extent those cases support the proposition that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense, they are overruled.

Article 134, UCMJ, is not an offense necessarily included in Article 95, UCMJ.[6] Consequently, the CCA was not authorized to affirm a finding of guilt to a simple disorder under Article 134, UCMJ. *See United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F.1999) ("An appellate court may not affirm an included offense on 'a theory not presented to the'

---

[6] Our opinion in *Medina* also noted that when comparing the elements of two offenses reveals that one offense is not necessarily a lesser included offense of the other, the requirement of notice to an accused may be met if the charge sheet "make[s] the accused aware of any alternative theory of guilt." *Medina*, 66 M.J. at 27; *see also MCM* pt. IV, para. 3.b.(1) ("The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged."). In this case, the charged offense as presented to the members did not reference the elements of prejudice to good order or service discrediting conduct such that the specification would have put Appellant on notice of Article 134, UCMJ, as a lesser included offense.

trier of fact." (quoting *Chiarella*, 445 U.S. at 236, 100 S.Ct. 1108)).

The decision of the United States Army Court of Criminal Appeals is reversed. The finding of guilty of Charge III and its specification are set aside and Charge III is dismissed. The sentence is set aside and the case remanded to the United States Army Court of Criminal Appeals for sentence reassessment or to order a rehearing on sentence.